Supreme Court, U.S.
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No. 95-83

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Alan Meghrig
and Margaret Meghrig,
Petitioners

vs.

KFC Western, Inc.,
Respondent

~~MOTION FOR LEAVE TO FILE AMICUS BRIEF~~
AND AMICUS CURIAE BRIEF OF

SOUTHERN CALIFORNIA SERVICE
STATION ASSOCIATION

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QUESTIONS PRESENTED

1. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which authorizes district courts to restrain persons who have contributed to contamination or to 'order such persons to take such other action as may be necessary", also authorizes a private party suit for reimbursement of clean up costs, despite the absence in RCRA, unlike CERCLA and other statutes of any express language authorizing such an action.

2. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which only permits suits against persons who have contributed to the generation, transport or disposal of solid or hazardous waste "which may present an imminent and substantial endangerment to health or the environment" authorizes a citizen suit for contamination that was fully remediated at least 3 years before the action was commenced.

TABLE OF CONTENTS

Questions Presented. I

Table of Contents... II

Table of Authorities.. III

Interest of Amicus and Summary of Argument ... 1

ARGUMENT..... 12

I. The 9th Circuit Decision is Based upon Erroneous Assmptions 14

II. The Plain Langauge of the Statute ...18

III. Nothing In The Legislative History Supports the Creation of This Implied Cause of Action ...25

IV. If Such a Cause of Action Exists, It Is Limited To Imminent and Substantial Endangerments ...31

V. Conclusion ... 34

TABLE OF AUTHORITIES

CASES

California v. ARC America,
490 U.S. 93 (1989)... 43
Campbell v. Hussey
368 U.S. 297 (1961)....9
Cippolone v. The Liggett Group,
510 U.S.____, 112 S.Ct. 2608..32,33
Darling v. Mobil Oil Corp.
864 F.2d 981 (2nd Cir. 1989)...37,38
Esso Standard Oil Company v. Dept. of Consumer Affairs,
793 F.2d 431 (1st Cir. 1985)
.34,35,36,37,38
Jiminez v. BP Oil Co.;
853 F.2d 268 (4th Cir. 1988)....3,4
Lippo v. Mobil Oil Corp.
776 F.2d 706, (7th Cir. 1985)... 14
Morales v. Trans World Airlines,
510 U.S. ,112 S.Ct. 2031 (1992).. 12
O'Melveny and Myers v. FDIC,
512 US___, 129 L.Ed 2d 67 (1994)
.....14,17,39
Shaw v. Delta Airlines
463 U.S. 85 (1985)..... 11, 12
Slatky v. Amoco Oil Co.,
830 F.2d 476(3rd Cir.in banc 1987)
.....25
Wingard v. Exxon Co. USA,
819 F.Supp 473 (D. S.C. 1993)
..... 43

STATUTES & LEGISLATIVE HISTORY

15 USC 2802 (a).. 3,27
15 USC 2802 (b)..... 5
15 USC 2802 (b)(2)(a) ...8
15 USC 2802 (b)(2)(C)....7

15 USC 2802(c) (11).....7
15 USC 2805 6
15 USC 2806 6,28,29

1978 U.S.Code Cong. & Ad. News 873
..... 20,27,29,30
Cong. Record
April 5, 1977 p. 10378,83 .....
25,26
Hearings on HR13000 before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Power (94th Cong., 2d Sess.),
.....24,25
Public Law No. 103-371(1994)
.... 13,15,20

VA. CODE ANN. 59.1-21.14..... 23
VA. CODE ANN. 59-1.21.15.....24

MISCELLANEOUS

1994 National Petroleum News Factbook.
..... 2
"Judicial Interpretation of the Petroleum Marketing Practices: Conflict and Diversity." 32 Emory L.J.273 (1983).....1

L.Tribe, American Constitutional Law , 2nd Ed 1988.....31,32

STATEMENT OF THE CASE

Amici hereby adopt the statement of the case as shall be set forth in Petitioner's brief on the merits.

INTRODUCTION AND INTEREST OF AMICUS

Amicus, the Southern California Service Station Dealers Association, represents the interests of gasoline retailers throughout the region, a region which is the largest single petroleum market in the world.

The activities of the gasoline retailers represented by the Association have been extensively regulated by RCRA since 1984 Amendments became effective.

The interpretation of RCRA, especially with respect to underground storage tanks , is of tremendous

concern to the Association.

If the interpretation of the 9th Circuit is upheld, the practical impact on our members would go far beyond the legal implications.

In particular, if upheld, the ruling would hurt our members ability to obtain investment capital, and would <u>substantially</u> drive up our costs of dealing with the RCRA regulated substances that are at the heart of the daily operation of a modern service station.

Moreover, if upheld, the ruling would effectively repeal EPA's newly promulgated underground tank lender liability rule. 60 Fed. Regis. 46692 (Sept. 7, 1995).

EPA explained the need for the

rule:

" Until now, EPA believes that concerns over environmental liability have made a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of UST's. The free flow of credit to UST owners (many of whom are small entities and that may rely on secured financing mechanisms for capital){such as our members}, is expected to assist UST owners and operators in meeting their obligations to upgrade, maintain, or otherwise comply with RCRA Subtitle I and other environmental requirements.

Conversely, the lack of such capital may adversely affect the ability of an UST owner to meet its obligations under subtitle I **with concomitant adverse environmental impacts from UST's and UST systems, that are out of compliance due to the lack of financing to make the necessary improvements.** 60 Fed. Regis. at 46692, 46693.

It is extremely important that the Court be aware that the major reason EPA believes the tank lender liability rule will withstand scrutiny is the absence of a private damage

action under RCRA subtitle I; whereas a similar rule under CERCLA was struck down by the D.C. Circuit in Kelley, et.al. v. EPA, No. 93-1312, 23 F.3rd 132.

EPA explains:
" The Court held that "EPA lacked statutory authority to restrict by regulation private rights of action under the statute....
Whereas CERCLA contains a provision regarding private rights of action, there is no explicit provision for private rights of action contained under RCRA Subtitle I. "

This ruling reverses that well settled principal, a principal that has been relied upon by both regulators and the regulated community.

The importance of the rule to our members, a rule put in jeopardy by the 9th Circuit ruling, compels us to seek reversal.

A review of the history of regulation of underground storage tanks, shows why creation of this new federal cause of action by the 9th Circuit is particularly inappropriate.

Prior to 1983, gasoline underground storage tanks were largely out of sight and out of mind.

Those instances where leakage had occurred were dealt with under state law, under a variety of theories, ranging from strict liability, See, e.g., Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (Md. 1969), to trespass and nuisance.

A series of highly publicized leaks, in particular, one at Canoe Park, Rhode Island, that ended up on the TV show "60 Minutes", spurred

calls for Congressional action.

Members of Congress were told by the EPA that it lacked authority under existing statutes to reembodied leaking underground storage tanks ("LUSTS").

In particular, Superfund (CERCLA) could not be used, because gasoline falls within the "petroleum exclusion" found at 42 U.S.C. 9614. See generally, Wilshire Westwood Associates v. Atlantic Richfield Co., 881 F.2d 801 (9th Cir. 1991).

As a result, two bills amending CERCLA were introduced in that 98th Congress, H.R. 4761 by Rep. Ritter, and S. 2513 by Sen. Durenberger, that shared two common objectives:

(1) to repeal the petroleum exclusion

and allow Superfund authority to be used in leaking tank cases and (2) to authorize EPA to establish regulations for UST's.

Amicus, represented by Counsel of Record, and our national organization, the Service Station Dealers of America, were key players in the ensuing legislative debate.

The industry viewed repeal of the petroleum exclusion as a costly disaster in the making. If gas stations were hung with the "Superfund Site" label, investment capital and liability insurance would disappear, and the cost of handling our products would skyrocket.

On the other hand, regulation was viewed as a sensible step.

As a result, a consensus was reached which enabled a regulatory program to be established under Subtitle I of RCRA created by the 1984 Amendments. See generally, House Report 98-1133, 98th Cong., 2nd Sess. (1984).

Nevertheless, a Congressman or Senator with a tank leak in his or her district could not call EPA and request a federal response to a tank leak.

The next Congress saw proposals to partially lift the petroleum exclusion, 42 USC 9614, by defining releases from petroleum underground tanks as hazardous substances. See, Section 101 of HR 2560 (99th Cong. 1st Session)(by Rep. Florio).

As with the proposals to repeal the petroleum exclusion in its entirety, the Florio proposal was killed in subcommittee, despite the fact that Rep. Florio was the Chairman.

It is instructive to note that had any of these proposals passed, then a federal cause of action for cost recovery would exist.

The fact that they did not pass shows that the 9th Circuit ruling lacks merit.

The 99th Congress again decided not to subject this critical industry to the " Superfund Stigma ".

Under Section 205 of the 1986 Superfund Amendments and Reauthorization Act (SARA) a

comprehensive financial responsibility scheme was established, along with creation of the federal leaking underground storage tank trust fund. See, 42 U.S.C. 6991b.

Although a Superfund bill was used as the vehicle, the fund was created under RCRA, primarily because of the desire to keep tanks out of the mess that Superfund had turned into. See generally, House Report # 99-962, (99th Cong. 2d Session) (The conference report on SARA.)

The net result of the legislative debate was to create a comprehensive regulatory scheme, See 60 Fed. Regis. 46693- 46694, and 40 CFR 280, 281, that EPA was authorized to, and in fact has, "franchised" to the states

under 42 USC 6991c.

For purposes of this case, the key provisions are those dealing with corrective action, financial responsibility, and the federal and state funds.

EPA's financial responsibility regulations (40 CFR part 280 subpart H) require UST owners and operators to maintain an annual aggregate of financial assurance of 1 million or 2 million, depending on the number of UST's owned.

The method of demonstrating financial assurance most relied upon nationwide is the 41 state tank trust funds.

California has a tank fund set up on the authority of the Section

25299.10 of the Health and Safety Code.

That fund, like others, was set up because of the unavailability of insurance, see, Cal. Health & Safety Code 25299.10 (b)(4) and provides reimbursement for eligible claimants.

It was also designed so that California could obtain its "tank franchise" from EPA, and enacted to further

" the interest of the people of the state in order to avoid <u>direct federal regulation</u>, of persons already subject to state law...Cal. Health & Safety Code 25299.10 (b)(10).

The 9th Circuit was wrong to find an implied federal cause of action in this area, which has always been a matter of state law.

<u>ARGUMENT</u>

As a threshold matter, SCSSA believes the time has come for the Court to refine the analysis under Cort v. Ash 422 U.S. 66 (1975), as to when an implied cause of action is available under a federal statute.

Specifically, we believe that where the statute does not expressly provide for the cause of action or relief sought, there must exist a clearly articulated and affirmatively expressed intent in the legislative history to affirmatively create such a cause of action.

If this threshold inquiry is not met, then federal courts should not be required to engage in the analysis under the other three factors enunciated in Cort.

As demonstrated, infra, this test cannot be met, therefore then decision below should be reversed on this basis alone.

I. The 9th Circuit Decision is Based Upon Erroneous Assumptions

The basis of the 9th Circuit decision is an assumption that to rule against an implied right of action for contribution under RCRA would leave the plaintiffs without a remedy, and thus would be "bad public policy".

The fact is that state law has always provided the remedies for our members, who have more experience with petroleum contaminated properties than anyone else.

More importantly, due to the requirements of RCRA that underground tank owners and operators be able to

demonstrate financial responsibility , (See, 40 CFR Part 280 Subpart H), and the unavailability of underground tank insurance for small businesses such as those operated by our members (See, Federal Register of Dec. 23, 1991, delaying starting date of financial responsibility regulations), California and 41 other states have created underground tank clean up funds.

They are designed to reimburse petroleum tank clean up costs such as those at issue in this case.

The 99th Congress used the Superfund reauthorization process to create a leaking underground storage tank (LUST) trust fund in RCRA, by amending Subtitle I.

The statute expressly limits the right of cost recovery from the federal fund to EPA or the states.

Neither service station dealers, who pay the tax that finances the fund, nor any other private party are allowed to tap into the federal fund for reimbursement, rather cost recovery is limited to EPA and the states. 42 U.S.C. 6911b(6)(a).

The reimbursement issue has quite properly been handled by the states, and claims for reimbursement have been, and continue to be made to state tank funds in California and 41 other states, and the full range of legal remedies under state law will continue to be available to our members, who buy more contaminated property than

anyone else, as well as to others.

What the 9th Circuit majority saw as bad public policy, was in fact a carefully crafted legislative response, that has created an award winning program and a model federal - state partnership.

In this case, the bad public policy would come about through legislating from the bench, based upon the erroneous assumption that the Respondent, or similarly situated persons would be left without a remedy.

The second erroneous assumption made by the 9th Circuit majority is that the same remedies available to the EPA Administrator should also be available in a citizens suit. 49 F.3rd

@ 521-522.

In Furrer v. Brown, 62 F.3rd 1092, 1100, the 8th Circuit aptly described this argument as a non sequitur.

As previously noted, the 1986 Superfund Amendments created the federal Underground Storage Tank Trust Fund, but limited cost recovery to costs incurred by " the Administrator or by a State" . 42 USC 6991b (6)(a).

Neither the general language of RCRA, nor the specific language of the Underground Tank Program created by Subtitle I thereof; authorize the relief sought by the Respondent.

II. THE PLAIN LANGUAGE OF THE STATUTE

In pertinent part, 42 U.S.C.

6972(a)(1)(B) allows any person to maintain a civil suit :

" on his own behalf against any past or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present to the past or present handling, storage, treatment or disposal of any solid or hazardous waste <u>which may present an imminent and substantial endangerment to health or the environment...</u>

The district court shall have jurisdiction to ... enforce permits and other requirements, to restrain any person who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste...
<u>to order such person to take such other action as may be necessary</u>, or both..."

The 9th Circuit majority attempted to support its holding by relying on the term <u>" order such person to take such other action as may be necessary "</u> with respect to solid or hazardous waste that is

posing an imminent and substantial endangerment to health or the environment.

We believe the key is the term "necessary".

SCSSA fails to see how it is "necessary" to award damages under federal law in order to have a potentially responsible party abate an imminent and substantial endangerment.

In its analysis of the Cort v. Ash factors in Furrer, the 8th Circuit noted that a persuasive argument can be made that the Furrers, (as well as respondent KFC Western herein), are in a class of persons that 42 USC 6972 is directed against - owners of a storage facility where hazardous waste has presented an imminent and substantial

endangerment. 62 F.3rd @ 1092.

The key point is the carrot of a potential damage award under RCRA is not what would motivate a service station operator or owner of a leaking tank to take action; it is the stick of "corrective action" mandated by 42 U.S.C. 6991b(h)(2) et. seq.; which is backed up by the threat of heavy fines and even criminal prosecution in some cases under state (See, e.g. Cal. Health and Safety Code Sec. 25299) or federal law if the action is not taken.

Thus, to characterize potential damage awards made by federal courts under RCRA as "action necessary" defies logic and common sense.

Additionally, to the extent that

"carrots" are relevant at all, those carrots exist in the form of the ability of owners and operators who have complied with the applicable UST regulations to seek reimbursement under state funds.

We would also note that the 9th Circuit fails to take account of the fact that there are thousands of orphan tank sites where a responsible party either cannot be found, or those that can be found lack the ability to pay.

In these cases the citizen suit/ damage carrot is illusory, and Congress did not delude itself into thinking that citizen suits seeking damages from non-existent or incapacitated parties are "necessary"

to fulfill the statutory objective.

Instead, Congress created the "LUST Trust Fund", in large part to deal with such orphan sites.

The fact that a private party has no right to tap into the federal Trust Fund is telling evidence of two facts: (1) that the federal cause of action implied by the 9th Circuit does not exist and (2) that an implied federal cost recovery cause of action can not be justified on the basis that it is "action necessary" to ensure the abatement of imminent and substantial hazards to health or the environment.

Simply put, if Congress had intended to allow the relief sought, it would have done so in the plain language of the statute.

The failure of efforts to do so such as the effort to repeal the CERCLA petroleum exclusion failed.

Significantly, in the same legislation that created the federal tank fund, the 1986 Superfund Amendment and Reauthorization Act, (SARA), Congress expressly provided that private parties such as Respondents could seek cost recovery for " **necessary costs of response incurred by any other person consistent with the National Contingency Plan.** " 42 U.S.C. 6907(a)(2)(B).

As discussed in detail, supra, during that debate, Congress rejected proposals that would have partially lifted the " petroleum exclusion ", 42

USC 9614, to Superfund by defining releases from petroleum underground tanks as hazardous substances. See, Section 101 of HR 2560 (99th Cong. 1st Session)(by Rep. Florio).

Had the petroleum exclusion to Superfund been fully or partially removed, then CERCLA would provide the cause of action sought by Respondents, and implied by the 9th Circuit.

This fact lends further support to view taken by the 8th Circuit in Furrer; and clearly demonstrates that the opinion below must be reversed.

III. NOTHING IN THE LEGISLATIVE HISTORY SUPPORTS THE CREATION OF THIS IMPLIED CAUSE OF ACTION

RCRA has contained a citizen suit provision dating back to its original enactment in 1976.

According to the discussion of the original citizens suit provision found in Senate Report 94-988, 94th Cong. Second Session @ p.18:

" The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act Amendments of 1972.

The bill provides for citizen participation in the enforcement of requirements and regulations established under this Act.

This provision is carefully restricted to actions where violations of standards or regulations or a failure on the part of officials to perform mandated action is alleged.

Time is provided between notice and filing of the action to give the State or the Administrator an opportunity to act on the alleged violation."

We believe two points are critical here.

First, from its inception, the RCRA citizen suit provision has been "carefully restricted".

Those "careful restrictions" have never been removed by Congress, despite efforts to do so.

Even a cursory review of the Conference Report to the 1984 Amendments reveals that :

" **The Senate Amendment contains a similar provision, <u>limiting</u> citizens' right of action ...**
<u>CONFERENCE SUBSTITUTE.-</u> The Conference Substitute adopts the Senate Amendment with <u>additional</u> limitations on citizens' right of action ..."
House Report # 98-1133 (98th Cong. 2d Session, 1984).

If Congress has removed these " careful restrictions " and " additional limitations ", then the source of that removal is absent from the legislative history.

Given the detailed list of restrictions spelled out in the Conference Report, (and the statute

itself), it stands to reason that such restrictions would appear in the important areas of what costs are recoverable, and the statute of limitations.

The 9th Circuit opinion gives us no guidance as to what costs would be recoverable, rather it would require an ad hoc determination of whether the costs incurred are, or were, "necessary action".

By contrast, under CERCLA, where the right to seek reimbursement for clean up costs incurred, is expressly provided for in the statute, the only costs recoverable are those that are **"consistent with the National Contingency Plan"** . 42 U.S.C. 9607(a).

A second area where the 9th Circuit would throw "careful

restrictions" out the window is with respect to the statute of limitations.

CERCLA provides a remarkably detailed statute of limitations for cost recovery actions.

RCRA's silence on this point, both in the statute, as well as in the legislative history, is deafening.

If Congress' intended to create a private damage action under "carefully restricted" citizen suit provision under RCRA, it would have spelled out, as it did in CERCLA, what costs are recoverable, and when an action to recover such costs must be filed.

At a minimum, we should be able to find legislative history that clearly articulates and affirmatively expresses what costs are recoverable,

what standard is used in conducting judicial review of such cost recovery actions; and what statute of limitations is to be applied.

Such history is conspicuous by its absence, thus it is entirely inappropriate to "unlimit" the carefully restricted RCRA citizen suit provision.

The second point made clear by the legislative history is that the result in this case is virtually dictated by the decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 17 (1981).

As discussed, supra, the history makes clear that the RCRA citizen suit provision is based upon the comparable

provisions of the Clean Air Act.

In Sea Clammers, 453 U.S. 1, (1981), the Court noted that the Clean Air Act of 1970 " **makes no provision for damages to the individual**" 453 U.S. at 17, citing 116 Cong. Record 33104 (19700 (Statement of Senator Hart).

It should be noted that the legislative history does reveal an effort in the House to undercut the holding of Sea Clammers and also that of Milwaukee v. Illinois (II), 451 U.S. 304 (1981), with respect to the issue of whether the issue of whether actions may be brought under RCRA pursuant to supplementary authority to the express language of the statute inferred by "federal common law".

See, House Report 98-198, Part 3, at p.20 (Judiciary Committee).

The provision was dropped in Conference, as evidenced by the following:

" I note with satisfaction the decision of the Conference Committee to reject the House Amendment entitled " Preservation of Other Rights " ;

This innocuous sounding amendment was intended to convey the message to the federal judiciary that there is a " federal common law " applicable to hazardous waste.

As a result of the decisions in the City of Milwaukee and National Sea Clammers cases, it is clear beyond dispute that there cannot be any "federal common law" in an area covered by a comprehensive Federal statute such as the Solid Waste Disposal Act.....

The ironic thing is that there is hardly any area in which the ad hoc creation of remedies by individual judges is less necessary."
(Cong. Rec. Oct. 5, 1984 pp. S13812, 13813; (remarks of Sen. Simpson).

Whether it is viewed as an implied cause of action, or an attempt

to revive the notion that " federal common law " can create causes of action, the fact is that Congress affirmatively rejected attempts on several fronts to create the cause of action conjured up by the 9th Circuit majority.

The legislative history does not clearly articulate and affirmatively express an unmistakable implication that Congress intended to create the cause of action relied upon, therefore we believe no further inquiry should be required.

Congress rejected numerous efforts to create the federal private cause of action damage, such as by repealing the petroleum exclusion to CERCLA.

The ruling sought by the Respondents would have the same practical effect, and revolutionize the rules of the game that those of us who making our living in the petroleum marketing industry have lived with for over a decade.

In conclusion, the legislative history is utterly devoid of the a clearly articulated and affirmatively expressed intent to create the cause of action sought by petitioners, therefore the opinion below must be reversed.

IV. IF SUCH A CAUSE OF ACTION EXISTS IT IS LIMITED TO IMMINENT AND SUBSTANTIAL ENDANGERMENTS

The plain language of the citizen suit provision allows a person to bring an action:

" on his own behalf against any past

or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present to the past or present handling, storage, treatment or disposal of any solid or hazardous waste <u>which may present an imminent and substantial endangerment to health or the environment...</u>

The key is the term " imminent". There is simply no imminent endangerment where the site has question had been cleaned up three years prior to the action being brought.

Thus, even if a cause of action for damages can be implied, it cannot be applied under the facts of this case.

The endangerment in this case is neither "imminent" nor is it ongoing, rather damages are sought for actions of the past.

Application of the principles enunciated in Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987), where this Court held that under the Federal Water Pollution Act, no action should lie where a citizens suit is based upon violations that occurred entirely in the past, shows that no cause of action should lie in the case at bar.

CONCLUSION

Congress never intended to create a private right of action for damages under RCRA generally, or under the underground tank program created by Subtitle I of RCRA specifically.

The practical effect of the 9th Circuit's ruling is enormous. Congress was aware of those effects and thus

did not provide the cause of action implied by the 9th Circuit.

The opinion under review amounts to judicial repeal of a carefully crafted legislative framework that has worked well.

SCSSA therefore must urge the Court to reverse the decision of the 9th Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 1995, I served, via facsimile, and by air courier copies of this Motion for Leave to File and Brief Amicus Curiae in Support of Petitioners upon:

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